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ROBERT DE VICO

2012 OCT -2 AM 10:42
CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
LOS ANGELES

FILED

By Matthew Resnik
Dated October 1, 2012

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

ROBERT DE VICO,

Plaintiff,

vs.

U.S. BANK, N.A., a corporation; GMAC
MORTGAGE U.S.A. CORPORATION, a
corporation; ETS SERVICES, LLC, a
limited liability company; and Does 1 to 10,
Inclusive,

Defendants.

) Case No. **CV12-8440** - (CBM)
(Ex)

) **EX PARTE APPLICATION FOR A**
) **TEMPORARY RESTRAINING ORDER**
) **AND AN ORDER TO SHOW CAUSE RE:**
) **PRELIMINARY INJUNCTION TO**
) **ENJOIN BANK FROM FORECLOSING**
) **ON THE SUBJECT PROPERTY ON OCT.**
) **3, 2012 at 11:00 am; MEMORANDUM OF**
) **POINTS AND AUTHORITIES IN**
) **SUPPORT THEREOF; DECLARATION**
) **OF ROBERT DE VICO**

) Complaint Filed: Oct. 1, 2012

) Hon. _____

) Dept.: _____

) Trial Date: Not Set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 1, 2012, Plaintiff ROBERT DE VICO
("Plaintiff") will apply for a temporary restraining order to restrain Defendants from
foreclosing on the subject property, and for an order requiring Defendants to show cause why a

EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND AN ORDER TO SHOW
CAUSE RE: PRELIMINARY INJUNCTION TO ENJOIN BANK FROM FORECLOSING ON THE SUBJECT
PROPERTY ON OCT. 3, 2011 @ 11:00 am

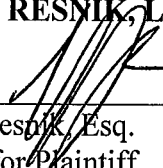
1 preliminary injunction should not be issued pending trial in this action, enjoining defendants
2 and their employees, agents, and persons acting with them or on their behalf, from selling,
3 attempting to auctioning, sell, causing to be sold, transferring ownership or further encumbering
4 the real property located at **3380 Deronda Drive, Los Angeles, CA 90038** ("Subject
5 Property").

6 Plaintiff respectfully requests that the Court enjoin defendants from auctioning, selling,
7 causing to be sold, transferring ownership or further encumbering the Subject Property. This
8 application is made pursuant to the Cal. Code of Civil Procedure §527, on the grounds that
9 Plaintiff is the rightful and lawful owner of the Subject Property, and will suffer immediate and
10 irreparable harm if defendants are not enjoined from auctioning, selling, causing to be sold,
11 transferring ownership or further encumbering the Subject Property. This application is based
12 upon the memorandum of points and authorities, plaintiff's declaration and the Complaint filed
13 in this matter.

14
15
16
17 Dated: October 1, 2012

Respectfully submitted,

SIMON & RESNIK, LLP

By: 
Matthew Resnik, Esq.
Attorneys for Plaintiff
ROBERT DE VICO

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 The Trustee's Sale on the Subject Property is scheduled to be held on **Oct. 3, 2012** at
5 11:00 am despite the fact that Defendants violated Cal. Civil Code section 2923.5 by, *inter alia*,
6 failing to initiate contact with plaintiff to explore alternatives to foreclosure at any time,
7 including at least 30 days prior to recording the Notice of Default.

8 As such, equity implores that the Court order that defendants be enjoined and restrained
9 from auctioning, selling, causing to be sold, transferring ownership or further encumbering the
10 Subject Property to save Plaintiff from suffering immediate and irreparable harm until and
11 unless such time as they comply with said statute.

12 **II.**

13 **PROCEDURAL HISTORY AND FACTUAL ALLEGATIONS**

14 On or about February 1, 2001, Plaintiff purchased the subject property.

15 On or about November 15, 2005, plaintiff refinanced the subject property with a 30-year,
16 5.75% loan of \$565,000.00 from T.J. FINANCIAL, INC. ("TJF") with a monthly payment of
17 \$3,342.19 (principal & interest). **Exhibit A** (relevant sections of Deed of Trust ("DOT")
18 recorded November 15, 2005; instrument no. 05 2745537; loan no. 2054459). Identified therein
19 as "Lender" is T.J. FINANCIAL, INC., "Trustee" is INVESTORS TITLE CORP., and
20 "nominee for Lender"/"beneficiary" is MERS.

21 On or about October 1, 2010, plaintiff called GMAC and spoke to "Rick", who identified
22 himself as an employee in GMAC's Loss Mitigation Dept. Plaintiff requested a loan
23 modification. Rick promised to send out a loan modification application package.

24 Plaintiff never received any loan modification package from GMAC. In fact, every time
25 plaintiff called GMAC, he requested said package, was promised it would be mailed but it never
26 did.
27

1 On or about November 1, 2010, plaintiff made his last payment on the subject loan. As
2 of this date, plaintiff had always been current.

3 On December 2, 2011, MERS purported to assign the subject loan to U.S. BANK, N.A.
4 AS TRUSTEE FOR RFMSI 2005S9 (the "TRUST"). **Exhibit B** (Assignment of the DOT
5 recorded December 12, 2011; instrument no. 20111672086). This was the first recorded
6 assignment since plaintiff obtained the loan on or about November 15, 2005.

7 On December 5, 2011, U.S. BANK purported to substitute in ETS as trustee. **Exhibit C**
8 (Substitution of Trustee ("SOT")) recorded December 14, 2011; instrument no. 20111686437).

9 On December 14, 2011, U.S. BANK and ETS recorded a Notice of Default, alleging
10 arrearages of \$68,734.99 as of December 13, 2011. **Exhibit D** (document # 11-1686438; TS#:
11 CA1100046646).

12 At the bottom of p.2 of the NOD is a so-called "2923.5 declaration" executed by ETS'
13 "TRUSTEE [*sic*] SALE OFFICER" JENNIFER ESTEBAN, who purported to have complied
14 with said statute by either contacting or attempting to contact plaintiff at least 30 days prior to
15 recording the NOD to explore alternatives to foreclosure (i.e., no later than November 14, 2011).

16 On March 16, 2012, U.S. BANK and ETS recorded a Notice of Trustee's Sale ("NOTS"),
17 identifying a sale date/time of **April 9, 2012** at 11:00 am, and total outstanding balance of
18 \$589,648.46. **Exhibit E** (document # 12-0415992).

19 On April 12, 2012, plaintiff filed a related action in this Court (Case No. CV-12-03205-
20 MMM; the Hon. Margaret M. Murrow) against U.S. BANK, N.A., GMAC MORTGAGE, LLC,
21 ETS SERVICE, LLC and Does 1 through 10.

22 On April 16, 2012, plaintiff filed an amended complaint, invoking the court's diversity
23 jurisdiction under 28 U.S.C. §1332.

24 On September 25, 2012, the Court dismissed plaintiff's lawsuit without prejudice
25 essentially because a lack of diversity.
26
27

1 On October 1, 2012, plaintiff filed the present action. Plaintiff respectfully submits that
2 he cured the defects regarding diversity.

3 A trustee's sale is currently scheduled on the subject property for October 3, 2012 at
4 11:00 am.

5 **Factual Allegations regarding the TRUST**

6 Plaintiff contends that the purported transfers of the DOT and Note into the TRUST were
7 void because they occurred after the TRUST's Closing Date, thereby rendering these
8 instruments void.

9 On December 1, 2005, a Pooling & Servicing Agreement ("PSA") was created for the
10 establishment of the TRUST. According to its terms, on or prior to the **Closing Date** of
11 **December 29, 2005** (but in no event later than ninety (90) days thereafter), any loans and Notes
12 – including plaintiff's loan and Note – would have had to been transferred into the Trust by the
13 date of the **transfer would be void. Exhibit F** (pp. 1-6 only – plaintiff will produce the
14 balance of the voluminous PSA upon request). As discussed below, the DOT was purportedly
15 assigned to the TRUST more than **six years after it closed**. Therefore, plaintiff contends that
16 no such assignment of the DOT or the Note in fact lawfully occurred.

17 According to the terms of the PSA, the Note had to be properly endorsed by every
18 intervening entity who laid claim to it at any time – which by the nature of the securitization
19 process necessarily consists of no less than three (3) entities: RESIDENTIAL FUNDING
20 MORTGAGE SECURITIES I, INC. as Sponsor and Seller; U.S. BANK, N.A. as Trustee; and
21 RESIDENTIAL FUNDING CORPORATION as Master Servicer. Notably, neither the Issuing
22 Entity, Custodian, nor the Depositor are identified therein.

23 Regardless of the foregoing, THE TRUST closed on **December 29, 2005**, and according
24 to the PSA, no assets (including plaintiff's loan and Note) could be transferred therein after three
25 months following the closing date in order to comply with IRS Code 860 (governing REMIC
26 trusts). The TRUST is a REMIC trust, which is designed as a tax shelter. However, in order to
27

1 qualify for that status, it must be "static", meaning that loans cannot be transferred in and out
2 beyond the Closing Date.

3 Finally, in order to be a valid transfer into the TRUST, several transfers of the loan must
4 be made within the TRUST itself in order to be valid: (1) The mortgage lender originates the
5 pool of loans (here, TJF); (2) then it sells the pool to an investment bank or other entity called a
6 sponsor (here, RESIDENTIAL FUNDING MORTGAGE SECURITIES I, INC.); (3) the
7 sponsor then sells the pool of loans to a special-purpose subsidiary, called the "depositor" that
8 has no other assets or liabilities in order to separate the loans from the sponsor's assets and
9 liabilities; and (4) then the depositor transfers the loans to a specially created, special-purpose
10 vehicle ("SPV") – i.e., a REMIC trust that holds the loans for the benefit of the investors
11 ("certificate holders").

12 III.

13 LEGAL STANDARD

14 Whether preliminary injunctive relief is governed by a multi-factor test: 1) whether
15 there is a likelihood of success on the merits; 2) whether there is a likelihood of irreparable
16 harm to plaintiff in the absence of such relief; 3) whether the balance of equities lies in
17 plaintiff's favor; and 4) whether injunctive relief is in the public interest. Winter v. NRDC, 129
18 S. Ct. 365, 374 (2008). However, in the Ninth Circuit, these factors are balanced against each
19 other on a sliding scale, such that, for example, the greater the showing on balance of the
20 equities the lesser must be the showing of likelihood of success. The Ninth Circuit had
21 traditionally applied the sliding-scale test such that preliminary relief could be entered where
22 either: a plaintiff demonstrates a likelihood of success on the merits and the possibility of
23 irreparable injury. Id.

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IV.

**PLAINTIFF IS LIKELY TO PREVAIL ON THE MERITS OF HIS COMPLAINT
BECAUSE THE EVIDENCE SHOWS THAT DEFENDANTS FAILED TO
COMPLY WITH CAL. CIV. CODE SECTION 2923.5.**

The NOD contains the following language that purports to comply with Cal. Civ. Code section 2923.5: “The beneficiary or its designated agent declares that it has contacted the borrower, tried with due diligence to contact the borrower as required by Cal. Civ. Code section 2923.5.

California Civ. Code section 2923.5 provides that a mortgagee, beneficiary, or authorized agent (“lender”) must contact—or exercise due diligence in attempting to contact—the borrower in person or by telephone thirty days prior to filing a notice of default “in order to assess the borrower’s financial situation and explore options for the borrower to avoid foreclosure.” Cal. Civ. Code § 2923.5(a). During the initial contact, the lender must advise the borrower that the borrower has the right to request a subsequent meeting and, if the borrower so requests, the lender must schedule a subsequent meeting within 14 days. Id. § 2923.5(a)(2).

California federal district and state courts have routinely overruled demurrers and motions to dismiss, and granted temporary restraining orders (“TROs”) and preliminary injunctions based largely or even solely on a 2923.5 violation by the foreclosing defendant-bank, including in this federal district. *See, e.g., Mazed v. JPMorgan Chase Bank* (C.D. CA case # SACV 11-814-JST (MGLx); PACER # 8:11-cv-00814-JST-MLG; August 23, 2011) (TRO and preliminary injunction granted based largely on 2923.5 violation).

(1) Plaintiff’s Declaration Supports His 2923.5 Violation Claim

As the servicer on the subject loan, GMAC would have been the entity to contact plaintiff in compliance with 2923.5. However, at no time did any GMAC, or any other defendant or entity for that matter, contact him at any time to explore “alternatives to foreclosure” as required by section 2923.5, much less at least 30 days prior to the recordation of the NOD. Plaintiff never received any such calls much less messages from defendant. Plaintiff

1 is familiar with defendant's 1-800 phone number and never received any such calls as reflected
 2 by GMAC's caller ID on his cell or home phones. Nor did he receive any correspondence from
 3 said entities regarding said "alternatives to foreclosure" 30 or more days prior to the recordation
 4 of the NOD.

5 Specifically, plaintiff has a (1) cell phone with voice mail; (2) home phone (land line)
 6 with an answering machine; and (3) work telephone number. -- each has caller ID and captures
 7 all missed calls, incoming calls and messages 24 hours a day, 7 days a week, 365 days a year.
 8 Each has caller ID and captures all missed calls, incoming calls and messages 24 hours a day, 7
 9 days a week, 365 days a year/

10 Plaintiff also has an e-mail account, fax machine at home and work, and mail box slot in
 11 the subject property's front door to which no one but plaintiff can access. At no time did he ever
 12 receive any such communications.

13 Plaintiff has always provided and updated these telephone & fax numbers and e-mail
 14 addresses to GMAC since he obtained the subject loan.

15 Plaintiff contends that said entities failed to (1) initiate contact with, or attempt to contact
 16 him re said alternatives; (2) inform him during any communication of his right to request an
 17 additional meeting within 14 days; or (3) provide him with the requisite 1-800 HUD telephone
 18 number. In other words, plaintiff contends that the section 2923.5 declaration is absolutely false
 19 and contradicted by the available evidence, and that as a result, the NOD is void *ab initio*.

20 **(2) Defendant's 2923.5 Declaration Should Be Rejected Based on Plaintiff's Declaration**

21 California federal district courts have found that where, as here, a plaintiff's complaint
 22 alleges facts directly contradicting statements in a 2923.5 declaration of compliance, such facts
 23 are sufficient to withstand at minimum a motion to dismiss. *See, e.g., Quintero Family Trust v.*
 24 *OneWest Bank, F.S.B.*, No. 09-cv-1561-IEG (WVG), 2010 WL 2618729, at *8 (S.D. Cal. June
 25 25, 2010).

26 The *Quintero* court stated that "In their SAC, Plaintiffs allege that no contact or attempt
 27 to make contact was made, despite the declaration in the Notice of Default. Taking this

1 allegation as true, the Court cannot determine at this time whether Defendants complied with the
2 requirement to contact Plaintiffs as set forth in § 2923.5(a).” Id.

3 Similarly, in *Pey v. Wachovia Mortg. Corp.*, (U.S. Dist. LEXIS 131699 at *27-28, N.D.
4 Cal. 2011), the court held that “whether Defendants attached a declaration to the Notice of
5 Default as required by section 2923.5(b) has no bearing on whether they actually complied with
6 the requirements of section 2923.5(a) by contacting Pey or exercising due diligence in an
7 attempt to contact him. Defendants cannot prove compliance with section 2923.5 simply by
8 pointing to a declaration on the Notice of Default.”

9 In its order denying defendant-bank’s motion to dismiss, the Central District court in
10 *Laden v. U.S. Bank National Assn.*, (C.D. Cal. Case 2:12-cv-00173-ODW-CW; order filed
11 02/13/12) stated that “Defendant disingenuously construes *Ortiz v. Accredited Home Lenders,*
12 *Inc.*, 639 F. Supp. 2d 1159, 1166 (S.D. Cal. 2009), to stand for the proposition that ‘[i]f a
13 complaint alleges due diligence was inadequate, but the Notice of Default is accompanied by a
14 declaration of compliance, a court must disregard the allegation and rely on the declaration.’
15 [...] [S]uch a broad reading is unmerited....” Id.

16 The *Laden* court went on to state that “Defendant argues that Plaintiff’s claim for
17 violation of Section 2923.5 must fail because Plaintiffs do not contend the contact required
18 under Section 2923.5 did not take place; instead, Plaintiffs merely contend that they had to
19 initiate such contact themselves. Accordingly, Defendant maintains that Plaintiffs have suffered
20 no prejudice as a result of Defendant’s alleged violation of Section 2923.5 because ‘they had
21 conversations with Defendant for the purpose of assessing plaintiffs’ financial situation and
22 exploring options to avoid foreclosure.’ However, Defendant does not contest Plaintiffs’
23 allegation that Defendant failed to inform Plaintiffs of their right to request a subsequent
24 meeting, as required by Section 2923.5(a)(2). Thus, even assuming without deciding that
25 Plaintiffs suffered no prejudice as a consequence of having to initiate contact with Defendant
26 themselves, the remaining allegations in Plaintiffs’ Complaint establish that Defendant
27 committed an additional violation of Section 2923.5 for which Plaintiffs may seek redress.
28 Defendant’s lack-of-prejudice argument is therefore unavailing. [...] Absent compliance with

1 Section 2923.5, there can be no valid notice of default. [...] [D]espite Defendant's insistence to
 2 the contrary, the mere filing of a declaration of compliance with a notice of default is not a
 3 panacea for any failure to adhere to the express requirements of Section 2923.5. Accordingly,
 4 the Court DENIES Defendant's Motion to Dismiss." Id.

5 Defendants will obviously have the opportunity to present evidence to the contrary prior
 6 to or at the preliminary injunction hearing in this matter.

7 **(3) The Remedy for a 2923.5 Violation is a Postponement of the Trustee's Sale**

8 The *Pey* court held that "the remedy for violation of section 2923.5 is not merely a
 9 postponement of the foreclosure sale, but rather a postponement of the sale *until the foreclosing*
 10 *party complies with the statute*". Id. See also *Paik v. Wells Fargo Bank, N.A.*, No. C 10-
 11 04016, 2011 U.S. Dist. LEXIS 3979, 2011 WL 109482, at *3 (N.D. Cal. Jan. 13, 2011) (holding
 12 that the only remedy for violation of this statute is postponement of a foreclosure sale until there
 13 has been compliance with the statute). In other words, until defendant communicates with
 14 plaintiffs to explore alternatives to foreclosure. Even then defendant will have to wait at least
 15 another 30 days before it can lawfully record a new NOD; see also *Mabry v. Super. Ct.*, 185 Cal.
 16 App. 4th 208, 223 (4th Dist. 2010) ("If section 2923.5 is not complied with, then there is no
 17 valid notice of default, and without a valid notice of default, a foreclosure sale cannot proceed.
 18 The available, existing remedy is . . . to postpone the sale until there has been compliance with
 19 section 2923.5.").

20 In *Skov v. U.S. Bank National Assn.*, 207 Cal. App. 4th 690 (Cal. App. 6th Dist., June 6,
 21 2012), the court stated the following: "Section 2923.5 and section 2924g, subdivision (c)(1)(A),
 22 when read together, establish a natural, logical whole, and one wholly consonant with the
 23 Legislature's intent in enacting 2923.5 to have individual borrowers and lenders 'assess' and
 24 'explore' alternatives to foreclosure: If section 2923.5 is not complied with, then there is no
 25 valid notice of default and, **without a valid notice of default, a foreclosure sale cannot**
 26 **proceed**. The available, existing remedy is found in the ability of a court in section 2924g,
 27 subdivision (c)(1)(A), to **postpone the sale until there has been compliance with section**
 28 **2923.5**. Reading section 2923.5 together with section 2924g, subdivision (c)(1)(A) gives

1 section 2923.5 real effect. The alternative would mean that the Legislature conferred a right on
 2 individual borrowers in section 2923.5 without any means of enforcing that right.” *Id.* at 698
 3 (quoting *Mabry*, 185 Cal. App. 4th at 223–224) (emphasis added).

4 IV.

5 PLAINTIFF IS LIKELY TO PREVAIL ON THE MERITS OF HIS COMPLAINT 6 BECAUSE THE EVIDENCE SHOWS THAT DEFENDANTS DID NOT LAWFULLY 7 TRANSFER THE SUBJECT LOAN

8 Without the transfer of the subject loan proceeding exactly as described, the transfer is
 9 void. *See, e.g., U.S. Bank v. Ibanez*, SJC-10694, 2011 WL 38071 (2011), wherein the
 10 Massachusetts Supreme Judicial Court invalidated two foreclosure sales. There, the Court held
 11 that in order to foreclose, the bank was required to show an unbroken chain of title from
 12 origination to securitization in full compliance with the PSA in order to establish ownership of
 13 the mortgage.

14 Plaintiff contends that this is precisely what happened, i.e., that his loan was not
 15 transferred according to the terms of the subject PSA. Indeed, it is impossible to even identify
 16 who the custodian and depositor are, much less whether the loan properly passed through their
 17 hands. As a result, even aside from the Closing Date, plaintiff contends that his loan was never
 18 lawfully transferred into the TRUST. Consequently, U.S. BANK has no legal right to foreclose
 19 on plaintiff’s home on behalf of the TRUST.

20 Plaintiff’s allegations herein are similar to those in several recent Ninth Circuit cases. In
 21 *Schafer v. CitiMortgage, Inc.*, 2011 WL 2437267 (C.D. Cal. 2011; order denying in part MTD
 22 filed June 15, 2011), this Court denied defendants’ motion to dismiss plaintiff’s declaratory
 23 relief claim, which was based on alleged improper transfer due to alleged fraud in the execution
 24 of documents.

25 Similarly, in *Vogan v. Wells Fargo Bank, N.A.*, 2011 WL 5826016 (E.D. Cal. 2011), the
 26 Court allowed plaintiffs’ claims to proceed when plaintiffs alleged that the assignment was
 27

1 executed **after the closing date of the securities pool**, “giving rise to a plausible inference that
 2 at least some part of the recorded assignment was fabricated.” *Johnson v. HSBC Bank, N.A.*
 3 (S.D. Cal. Case No. 3:11-cv-2091, order denying banks’ motion to dismiss (“MTD”) filed
 4 March 19, 2012).

5 In an identical case, *Johnson*, the Court found that plaintiff sufficiently alleged facts
 6 “showing the Assignment was defective, invalid, or somehow voidable. ... [T]he complaint
 7 states that MERS had no knowledge of the assignment, that Treva Moreland was never
 8 appointed to “assistant secretary” by the MERS’ board of directors, and thus there was no
 9 authority to make the assignment.” *Johnson v. HSBC Bank, N.A.* (S.D. Cal. Case No. 3:11-cv-
 10 2091, March 19, 2012); *see also In Kingman Holdings, LLC v. CitiMortgage, Inc.*, 2011 WL
 11 1883829 (E.D. Tex. 2011), where the court assessed a fraud claim against CitiMortgage in
 12 which the plaintiff alleged that MERS’ appointment of an assistant secretary (“Blackstun,” who
 13 later made the assignment) was invalid because it was not approved by the board of directors.
 14 The court upheld the fraud claim, finding that Plaintiff’s allegations were plausible and that if
 15 Blackstun had no authority to bind MERS, then MERS filed a fraudulent document after he
 16 executed the assignment. *Id.*

17 Based on the foregoing, plaintiff contends that he will prevail on his claim that
 18 defendants recorded a fabricated assignment of the loan because the assignment was executed
 19 after the closing date of the TRUST, and was executed by an individual who had no lawful
 20 authority to do so. This gives rise to a plausible inference of fabrication. (Indeed, defendants’
 21 conduct in recording the fabricated assignment is a **criminal violation** of Cal. Penal Code
 22 section 532(f)(a)(4) (mortgage fraud results from the recording any document relating to a
 23 mortgage loan transaction that the person “knows to contain a deliberate misstatement,
 24 misrepresentation or omission”).)

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VI.

**PLATINTIFF IS ENTITLED TO EQUITABLE RELIEF AND WILL SUFFER
IRREPARABLE HARM UNLESS THE INJUNCTION IS GRANTED**

In the Federal case of Demarest v. Quick Loan Funding, Inc., "The court may issue an injunction if the moving party establishes either (1) a combination of probable success on the merits **and** the possibility of irreparable harm or (2) the existence of serious questions going to the merits, a demonstration that there is at least a fair chance the movant will prevail, and a balance of hardships that tips sharply in the movant's favor. (Emphasis added) Demarest (April 2009) West Law 940377 (C.D.Cal.); No. CV 09-01687 MMM (SSx) (quoting Miller for and on Behalf of N.L.R.B. v. California Pacific Medical (1994) 19 F.3d 449, 456.) "[T]he greater the relative hardship to the moving party, the less probability of success must be shown." Demarest v. Quick Loan Funding, Inc., (April 2009) West Law 940377 (C.D.Cal.) ; No. CV 09-01687 MMM (SSx) (quoting National Ctr. For Immigrants Rights v. INS. (1984) 743 F.2d 1365, 1369.)

In the present case, the relative hardship to Plaintiff, i.e., losing his home and being evicted from the property, represents irreparable injury, decreasing the probability that must be shown (though plaintiff contends he has established probability of success). The loss of one's residence due to foreclosure constitutes irreparable injury. Demarest 2009 West Law 940377 at 9, (quoting Avila v. Stearns Lending Inc., (April 2008) West Law 1378231 (CD. Cal.); No. CV 08-0419-AG (CTx). The actual foreclosure of [plaintiff]'s residence and the imminent eviction from the property presents a threat of irreparable harm." Nichols v. Deutsche Bank Nat. Trust Co. (November 2007) West Law 4181111 (S.D.Cal.) at 3; Civil No. 07cv2039-L(NLS). "It may be said that if appellants proceed with the sale under the deed of trust, respondent will be deprived of this particular piece of property, and such damage may be considered irreparable for in equity each parcel of real property is considered unique." Stockton v. Newman, (1957)

1 148 Cal.App.2d 558, 564 (quoting Pomeroy, *Equity Jurisprudence*, Fifth Ed., Vol. 4, p. 1034,
2 sec. 1402).

3 **VII.**

4 **NO BOND SHOULD BE REQUIRED**

5 Plaintiff respectfully contends that no bond is required as defendants' interest in the
6 subject property is sufficient protected by their security interest therein. In the alternative,
7 plaintiffs respectfully request that a bond be imposed in the fair rental value of the property as
8 determined by an impartial realtor with knowledge of said value in plaintiffs' neighborhood.

9 **VIII.**


10 **CONCLUSION**

11 For the foregoing reasons, Plaintiff respectfully requests that the Court issue a
12 temporary restraining order and preliminary injunction to restrain and enjoin defendants from
13 auctioning, selling, causing to be sold, transferring ownership or further encumbering the
14 Subject Property to save Plaintiff from suffering irreparable harm.

15
16 Respectfully submitted,

17 **SIMON & RESNIK, LLP**

18 Dated: Oct. 1, 2012

19 By: 
20 Matthew Resnik, Esq.
21 Attorneys for Plaintiff
22 ROBERT DE VICO
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DECLARATION OF ROBERT DE VICO

I, Robert De Vico, declare under penalty of perjury that the following is true and accurate to the best of my recollection:

On or about October 1, 2010, I called GMAC and spoke to "Rick", who identified himself as an employee in GMAC's Loss Mitigation Dept. I requested a loan modification. Rick promised to send out a loan modification application package but never did.

Nor did anyone else from GMAC or any other defendant ever send me this package and I never received any loan modification package from GMAC. In fact, every time I called GMAC, I requested this package, and was promised it would be mailed but it never did.

At no time did any GMAC, or any other defendant or entity for that matter, contact me at any time to explore "alternatives to foreclosure" as required by section 2923.5, much less at least 30 days prior to the recordation of the NOD. I never received any such calls much less messages from GMAC or any other defendant. I am familiar with defendant's 1-800 phone number and never received any such calls as reflected by GMAC's caller ID on his cell or home phones. Nor did he receive any correspondence from said entities regarding said "alternatives to foreclosure" 30 or more days prior to the recordation of the NOD.


Specifically, I have a (1) cell phone with voice mail; (2) home phone (land line) with an answering machine; and (3) work telephone number -- each has caller ID and captures all missed calls, incoming calls and messages 24 hours a day, 7 days a week, 365 days a year. Each has caller ID and captures all missed calls, incoming calls and messages 24 hours a day, 7 days a week, 365 days a year/

I also have an e-mail account, fax machine at home and work, and mail box slot in the subject property's front door to which no one but me can access. At no time did Ihe ever receive any such communications.

I have always provided and updated these telephone & fax numbers and e-mail addresses to GMAC since I obtained the subject loan.

1
2 Date: Oct. 1, 2012

Executed in the City of Los Angeles, CA

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28 EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND AN ORDER TO SHOW
CAUSE RE: PRELIMINARY INJUNCTION TO ENJOIN BANK FROM FORECLOSING ON THE SUBJECT
PROPERTY ON OCT. 3, 2011 @ 11:00 am

Exhibit "A"

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05 2745537

RECORDED/FILED IN OFFICIAL RECORDS
RECORDER'S OFFICE
LOS ANGELES COUNTY
CALIFORNIA
11/15/05 AT 08:00am

TITLE(S) : _____



FEE	FEE \$ 37 ⁰⁰ JJ
	DAF \$ 2 ⁰⁰
	C-20

//

D.T.T.

NOTIFICATION SENT \$4 ©

CODE
20

CODE
19

CODE
9

Assessor's Identification Number (AIN)

To be completed by Examiner OR Title Company in black ink.

Number of AIN's Shown

THIS FORM IS NOT TO BE DUPLICATED

11/15/05

UNITED TITLE COMPANY/L.A.

After Recording Return To:
T.J. FINANCIAL, INC.
181 W. HUNTINGTON DR. #108
MONROVIA, CA 91016

05 2745537

LOAN NO. 2054459

10510746.2

MIN: 100046120544590003

[Space Above This Line For Recording Data]

DEED OF TRUST**DEFINITIONS**

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) "Security Instrument" means this document, which is dated **November 3, 2005**, together with all Riders to this document.

(B) "Borrower" is **ROBERT DE VICO, AN UNMARRIED MAN.**

Borrower is the trustor under this Security Instrument.

(C) "Lender" is **T.J. FINANCIAL, INC.** Lender is A **CALIFORNIA CORPORATION**, organized and existing under the laws of **CALIFORNIA**. Lender's address is
181 W. HUNTINGTON DR. #108, MONROVIA, CA 91016.

(D) "Trustee" is **INVESTORS TITLE CORPORATION, A CALIFORNIA CORPORATION**
The beneficiary is Mortgage Electronic Registration Systems, Inc. ("MERS") (solely as nominee for Lender, as herein after defined, and Lender's successors and assigns). MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O.Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.

(E) "Note" means the promissory note signed by Borrower and dated **November 3, 2005**. The Note states that Borrower owes Lender

FIVE HUNDRED SIXTY FIVE THOUSAND AND 00/100*****

Dollars (U.S. \$ **565,000.00**) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than **December 1, 2035**.

(F) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."

(G) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

(H) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

- | | | |
|--|---|--|
| <input type="checkbox"/> Adjustable Rate Rider | <input type="checkbox"/> Condominium Rider | <input type="checkbox"/> Second Home Rider |
| <input type="checkbox"/> Balloon Rider | <input type="checkbox"/> Planned Unit Development Rider | <input type="checkbox"/> Graduated Payment Rider |
| <input type="checkbox"/> 1-4 Family Rider | <input type="checkbox"/> Biweekly Payment Rider. | |
| <input type="checkbox"/> Other(s) [specify] | | |

8-52-1855

11/15/05

3

(I) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(J) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(K) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(L) "Escrow Items" means those items that are described in Section 3.

(M) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(N) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(O) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(P) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(Q) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in the county of **LOS ANGELES**

[Name of Recording Jurisdiction]

THE SOUTHWESTERLY 22 FEET, MEASURED AT RIGHT ANGLES, OF LOT 8, AND ALL OF LOT 7, BOTH IN BLOCK 19 OF TRACT NO. 6450, IN THE CITY OF LOS ANGELES, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, AS PER MAP RECORDED IN BOOK 83 PAGES 31 THROUGH 40 INCLUSIVE OF MAPS, IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY.

EXCEPT THE SOUTHWESTERLY 20 FEET, MEASURED AT RIGHT ANGLES, OF SAID LOT 7.

APN: 5581-025-008

which currently has the address of **3380 DERONDA DRIVE**

[Street]

LOS ANGELES (HOLLYWOOD AREA)

, California

90068

("Property Address"):

[City]

[Zip Code]

CALIFORNIA—Single Family—Fannie Mae/Freddie Mac UNIFORM INSTRUMENT

Form 3005 1/01 (page 2 of 11 pages)

2054459

05 2745537

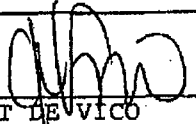
11/15/05

24. **Substitute Trustee.** Lender, at its option, may from time to time appoint a successor trustee to any Trustee appointed hereunder by an instrument executed and acknowledged by Lender and recorded in the office of the Recorder of the county in which the Property is located. The instrument shall contain the name of the original Lender, Trustee and Borrower, the book and page where this Security Instrument is recorded and the name and address of the successor trustee. Without conveyance of the Property, the successor trustee shall succeed to all the title, powers and duties conferred upon the Trustee herein and by Applicable Law. This procedure for substitution of trustee shall govern to the exclusion of all other provisions for substitution.

25. **Statement of Obligation Fee.** Lender may collect a fee not to exceed the maximum amount permitted by Applicable Law for furnishing the statement of obligation as provided by Section 2943 of the Civil Code of California.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Witnesses:



 ROBERT DEVICO

[Space Below This Line for Acknowledgment]

State of California

County ss: LOS ANGELES

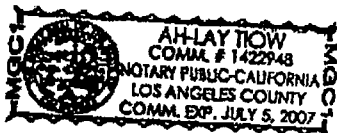
On 11-07-2005 Before me the undersigned, AH-LAY TLOW, A NOTARY PUBLIC

personally appeared ROBERT DE VICO,

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

Witness my hand and official seal.
 (This area for official notarial seal)

Signature Ah-Lay Tlow (seal)



CALIFORNIA--Single Family--Fannie Mae/Freddie Mac UNIFORM INSTRUMENT Form 3005 1/01 (page 11 of 11 pages)

2054459

05 2745537

Exhibit “B”

This page is part of your document - DO NOT DISCARD



20111672086



Pages:
0002

Recorded/Filed in Official Records
Recorder's Office, Los Angeles County,
California

12/12/11 AT 08:00AM

FEES:	18.00
TAXES:	0.00
OTHER:	0.00
PAID:	18.00



LEADSHEET



201112120190003

00005072632



003672135

SEQ:
09

DAR - Title Company (Hard Copy)



THIS FORM IS NOT TO BE DUPLICATED

t35

Requested and Prepared by:
Executive Trustee Services, LLC

When Recorded Mail To:
Executive Trustee Services, LLC
2255 North Ontario Street, Suite 400
Burbank, CA 91504-3120



110547556

Loan No.: 7440457893
TS NO: CA1100046646
MIN #: 100046120544590003
MERS Phone: 1-888-679-6377

ASSIGNMENT OF DEED OF TRUST

For Value Received, the undersigned corporation hereby grants, assigns, and transfers to:

U.S. Bank National Association as Trustee for RFMSI 2005S9

all beneficial interest under that certain Deed of Trust dated: 11/03/2005 executed by ROBERT DE VICO, AN UNMARRIED MAN, as Trustor(s), to INVESTORS TITLE CORPORATION, as Trustee, and recorded as Instrument No. 05 2745537, on 11/15/2005, in Book XX, Page XX of Official Records, in the office of the County Recorder of Los Angeles County, CA together with the Promissory Note secured by said Deed of Trust and also all rights accrued or to accrue under said Deed of Trust.

DATE: 12-2-11

MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC., AS NOMINEE FOR T.J.
FINANCIAL, INC. Its successors and assigns

Tyrone Thorogood
Tyrone Thorogood Assistant Secretary

State of Pennsylvania) ss.
County of Montgomery)

On 12/2/2011 before me, Paulina Maj Notary Public, personally appeared
Tyrone Thorogood who proved to me on the basis of satisfactory evidence to be the
person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that
he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their
signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted,
executed the instrument

I certify under penalty of perjury under the laws of the State of
foregoing paragraph is true and correct.

that the

WITNESS my hand and official seal

Signature *Paulina Maj* (Seal)

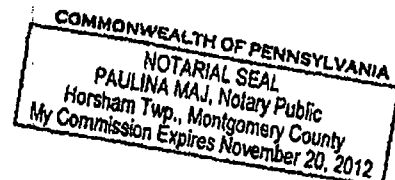


Exhibit "C"

RECORDING REQUESTED BY:

LSI TITLE COMPANY, INC.

Executive Trustee Services, LLC
 2255 North Ontario Street, Suite 400
 Burbank, CA 91504-3120
 800.665.3932

TS NO : CA1100046646
 LOAN NO : 7440457893

SPACE ABOVE THIS LINE FOR RECORDER'S USE

SUBSTITUTION OF TRUSTEE

WHEREAS, ROBERT DE VICO, AN UNMARRIED MAN was the original Trustor, INVESTORS TITLE CORPORATION was the original Trustee, and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR T.J. FINANCIAL, INC. was the original Beneficiary under that certain Deed of Trust dated 11/03/2005 and recorded on 11/15/2005 as Instrument No. 05 2745537, in Book XX, Page XX of Official Records of Los Angeles County, California; and

WHEREAS, the undersigned is the present Beneficiary under said Deed of Trust, and

WHEREAS, the undersigned desires to substitute a new Trustee under said Deed of Trust in place and instead of said original Trustee, or Successor Trustee, thereunder, in the manner in said Deed of Trust provided,

NOW, THEREFORE, the undersigned hereby substitutes Executive Trustee Services, LLC dba ETS Services, LLC, as Trustee under said Deed of Trust.

Whenever the context hereof so requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

Dated: 12-5-11

U.S. Bank National Association as Trustee for RFMSI 2005S9 by
 Residential Funding Company, LLC, fka Residential Funding
 Corporation, as its Attorney in Fact

Tyrone Thorogood
 Tyrone Thorogood Authorized Officer

State of Pennsylvania } ss.
 County of Montgomery }

On DEC 05 2011 before me, Mary Lynch Notary Public, personally appeared Tyrone Thorogood who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under penalty of perjury under the laws of the State of Pennsylvania that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature Mary Lynch (Seal)

COMMONWEALTH OF PENNSYLVANIA
 Notary Public

Exhibit “D”



RECORDING REQUESTED BY:

LSI TITLE COMPANY, INC.

WHEN RECORDED MAIL TO:

Executive Trustee Services, LLC
dba ETS Services, LLC
2255 North Ontario Street, Suite 400
Burbank, CA 91504-3120
APN: 5581-025-008

TS No.: CA1100046646

Loan No.: 7440457893

SPACE ABOVE THIS LINE FOR RECORDER'S USE

NOTICE OF DEFAULT AND ELECTION TO SELL UNDER DEED OF TRUST

IMPORTANT NOTICE

IF YOUR PROPERTY IS IN FORECLOSURE BECAUSE YOU ARE BEHIND IN YOUR PAYMENTS IT MAY BE SOLD WITHOUT ANY COURT ACTION,

and you may have the legal right to bring your account in good standing by paying all of your past due payments plus permitted costs and expenses within the time permitted by law for reinstatement of your account, which is normally five business days prior to the date set for the sale of your property. No sale date may be set until three months from the date this notice of default may be recorded (which date of recordation appears on this notice).

This amount is \$68,734.99 as of Dec 13, 2011, and will increase until your account becomes current. While your property is in foreclosure, you still must pay other obligations (such as insurance and taxes) required by your note and deed of trust or mortgage. If you fail to make future payments on the loan, pay taxes on the property, provide insurance on the property, or pay other obligations as required in the note and deed of trust or mortgage, the beneficiary or mortgagee may insist that you do so in order to reinstate your account in good standing. In addition, the beneficiary or mortgagee may require as a condition of reinstatement that you provide reliable written evidence that you paid all senior liens, property taxes, and hazard insurance premiums.

Upon your written request, the beneficiary or mortgagee will give you a written itemization of the entire amount you must pay. You may not have to pay the entire unpaid portion of your account, even though full payment was demanded, but you must pay all amounts in default at the time payment is made. However, you and your beneficiary or mortgagee may mutually agree in writing prior to the time the notice of sale is posted (which may not be earlier than the three month period stated above) to, among other things, (1) provide additional time in which to cure the default by transfer of the property or otherwise; or (2) establish a schedule of payments in order to cure your default; or both (1) and (2).

Following the expiration of the time period referred to in the first paragraph of this notice, unless the obligation being foreclosed upon or a separate written agreement between you and your creditor permits a longer period, you have only the legal right to stop the sale of your property by paying the entire amount demanded by your creditor. To find out the amount you must pay, or to arrange for payment to stop the foreclosure, or if your property is in foreclosure for any other reason, contact,

U.S. Bank National Association as Trustee for RFMSI 2005S9.
C/O Executive Trustee Services, LLC dba ETS Services, LLC
2255 North Ontario Street, Suite 400
Burbank, CA 91504-3120
800.665.3932 phone

TS NO.: CA1100046646

LOAN NO.: 7440457893

NOTICE OF DEFAULT AND ELECTION TO SELL UNDER DEED OF TRUST

If you have any questions, you should contact a lawyer or the governmental agency which may have insured your loan. Notwithstanding the fact that your property is in foreclosure, you may offer your property for sale provided the sale is concluded prior to the conclusion of the foreclosure.

Remember, YOU MAY LOSE LEGAL RIGHTS IF YOU DO NOT TAKE PROMPT ACTION.

NOTICE IS HEREBY GIVEN: That Executive Trustee Services, LLC dba ETS Services, LLC is either the original trustee, the duly appointed substituted trustee, or acting as agent for the trustee or beneficiary under a Deed of Trust dated 11/03/2005, executed by ROBERT DE VICO, AN UNMARRIED MAN, as Trustor, to secure certain obligations in favor of MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR T.J. FINANCIAL, INC., as beneficiary, recorded 11/15/2005, as Instrument No. 05 2745537, in Book XX, Page XX, of Official Records in the Office of the Recorder of Los Angeles County, California describing land therein as:

AS MORE FULLY DESCRIBED IN SAID DEED OF TRUST

including ONE NOTE FOR THE ORIGINAL sum of \$565,000.00; that the beneficial interest under such Deed of Trust and the obligations secured thereby are presently held by the undersigned; that a breach of, and default in, the obligations for which such Deed of Trust is security has occurred in that payment has not been made of:

Installment of Principal and Interest plus impounds and/or advances which became due on 10/1/2010 plus late charges, and all subsequent installments of principal, interest, balloon payments, plus impounds and/or advances and late charges that become payable.

That by reason thereof, the present beneficiary under such deed of trust, has executed and delivered to said duly appointed Trustee, a written Declaration of Default and Demand for same, and has deposited with said duly appointed Trustee, such deed of trust and all documents evidencing obligations secured thereby, and has declared and does hereby declare all sums secured thereby immediately due and payable and has elected and does hereby elect to cause the trust property to be sold to satisfy the obligations secured thereby.

The undersigned declares that the beneficiary or its authorized agent has declared that they have complied with California Civil code Section 2923.5 by making contact with the borrower or tried with due diligence to contact the borrower as required by California Civil Code Section 2923.5

Dated: Dec 13, 2011

ETS Services, LLC as Agent for Beneficiary

BY: 

Jennifer Estaban
TRUSTEE SALE OFFICER

Exhibit "E"

RECORDING REQUESTED BY:

LSI TITLE COMPANY, INC.

Executive Trustee Services, LLC
 2255 North Ontario Street, Suite 400
 Burbank, CA 91504-3120
 800.665.3932

TS NO : CA1100046646
 LOAN NO : 7440457893

SPACE ABOVE THIS LINE FOR RECORDER'S USE

SUBSTITUTION OF TRUSTEE

WHEREAS, ROBERT DE VICO, AN UNMARRIED MAN was the original Trustor, INVESTORS TITLE CORPORATION was the original Trustee, and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR T.J. FINANCIAL, INC. was the original Beneficiary under that certain Deed of Trust dated 11/03/2005 and recorded on 11/15/2005 as Instrument No. 05 2745537, in Book XX, Page XX of Official Records of Los Angeles County, California; and

WHEREAS, the undersigned is the present Beneficiary under said Deed of Trust, and

WHEREAS, the undersigned desires to substitute a new Trustee under said Deed of Trust in place and instead of said original Trustee, or Successor Trustee, thereunder, in the manner in said Deed of Trust provided,

NOW, THEREFORE, the undersigned hereby substitutes Executive Trustee Services, LLC dba ETS Services, LLC, as Trustee under said Deed of Trust.

Whenever the context hereof so requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

Dated: 12-5-11

U.S. Bank National Association as Trustee for RFMSI 2005S99 by
 Residential Funding Company, LLC, fka Residential Funding
 Corporation, as Its Attorney in Fact

Tyrone Thorogood
 Tyrone Thorogood Authorized Officer

State of Pennsylvania } ss.
 County of Montgomery }

On DEC 05 2011 before me, Mary Lynch
Tyrone Thorogood

Notary Public, personally appeared who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under penalty of perjury under the laws of the State of Pennsylvania that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature Mary Lynch (Seal)

COMMONWEALTH OF PENNSYLVANIA
 Notary Public

Exhibit "F"



Home / Document ID: 1857530

Pooling and Servicing Agreement

Entities: Cede & Co.; JPMorgan Chase Bank; Federal National Mortgage Association; Freddie Mac; McGraw-Hill Companies Inc.; Bank One, NA; First National Bank of Chicago; U.S. Bank, NA; Rfmsi Series 2005-S9 Trust

Date: 2006

ID: #1857530

[Download Full Document](#)

Start of Document

{DOCUMENT}
{TYPE}EX-10
{SEQUENCE}2
{FILENAME}s9ssfinal.txt
{DESCRIPTION}EX 10.1 SERIES SUPPLEMENT
{TEXT}

RESIDENTIAL FUNDING MORTGAGE SECURITIES I, INC.,

Company,

RESIDENTIAL FUNDING CORPORATION,

Master Servicer,

and

U.S. BANK NATIONAL ASSOCIATION,

Trustee

SERIES SUPPLEMENT,

DATED AS OF DECEMBER 1, 2005

TO

STANDARD TERMS OF

POOLING AND SERVICING AGREEMENT

DATED AS OF MAY 1, 2005

Mortgage Pass-Through Certificates

Series 2005-S9

{PAGE}

{TABLE}

{CAPTION}

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EXHIBITS

Exhibit One: Mortgage Loan Schedule (Available from the Company upon request.)
 Exhibit Two: Schedule of Discount Fractions (Available from the Company upon request.)
 Exhibit Three: Information to be Included in Monthly Distribution Date Statement
 Exhibit Four: Standard Terms of Pooling and Servicing Agreement dated as of May 1, 2005

{/TABLE}

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This is a Series Supplement, dated as of December 1, 2005 (the "Series Supplement"), to the Standard Terms of Pooling and Servicing Agreement, dated as of May 1, 2005 and attached as Exhibit Four hereto (the "Standard Terms" and, together with this Series Supplement, the "Pooling and Servicing Agreement" or "Agreement"), among RESIDENTIAL FUNDING MORTGAGE SECURITIES I, INC., as the company (together with its permitted successors and assigns, the "Company"), RESIDENTIAL FUNDING CORPORATION, as master servicer (together with its permitted successors and assigns, the "Master Servicer"), and U.S. BANK NATIONAL ASSOCIATION, as Trustee (together with its permitted successors and assigns, the "Trustee").

PRELIMINARY STATEMENT

The Company intends to sell Mortgage Pass-Through Certificates (collectively, the "Certificates"), to be issued hereunder in multiple classes, which in the aggregate will evidence the entire beneficial ownership interest in the Trust Fund. As provided herein, the REMIC Administrator will make an election to treat the entire segregated pool of assets described in the definition of Trust Fund, and subject to this Agreement (including the Mortgage Loans but excluding the Initial Monthly Payment Fund), as a real estate mortgage investment conduit (the "REMIC") for federal income tax purposes and such segregated pool of assets will be designated as "REMIC I." The Uncertificated REMIC Regular I Interests will be "regular interests" in REMIC I and the Class R-I Certificates will be the sole class of "residual interests" in REMIC I for purposes of the REMIC Provisions (as defined herein). A segregated pool of assets consisting of the Uncertificated REMIC I Regular Interests will be designated as "REMIC II," and the REMIC Administrator will make a separate REMIC election with respect thereto. The Class A-1 Certificates, Class A-2 Certificates, Class A-3 Certificates, Class A-4 Certificates, Class A-5 Certificates, Class A-6 Certificates, Class A-7 Certificates, Class A-8 Certificates, Class A-9 Certificates, Class A-10 Certificates, Class A-11 Certificates, the Class A-12 Certificates, Class A-P Certificates, Class M-1 Certificates, Class M-2 Certificates, Class M-3 Certificates, Class B-1 Certificates, Class B-2 Certificates, Class B-3 Certificates and the Uncertificated REMIC II Regular Interests Z will be "regular interests" in REMIC II and the Class R-II Certificates will be the sole class of "residual interests" therein for purposes of the REMIC Provisions. The Class A-V Certificates will represent the entire beneficial ownership interest in the Uncertificated REMIC I Regular Interests Z.

The terms and provisions of the Standard Terms are hereby incorporated by reference herein as though set forth in full herein. If any term or provision contained herein shall conflict with or be inconsistent with any provision contained in the Standard Terms, the terms and provisions of this Series Supplement shall govern. Any cross-reference to a section of the Pooling and Servicing Agreement, to the extent the terms of the Standard Terms and Series Supplement conflict with respect to that section, shall be a cross-reference to the related section of the Series Supplement. All capitalized terms not otherwise defined herein shall have the meanings set forth in the Standard Terms. The Pooling and Servicing Agreement shall be dated as of the date of the Series Supplement.

The following table sets forth the designation, type, Pass-Through Rate, aggregate Initial Certificate Principal Balance, Maturity Date, initial ratings and certain features for each Class of Certificates comprising the interests in the Trust Fund created hereunder.

{TABLE}
 {CAPTION}

DESIGNATION	PASS-THROUGH RATE	AGGREGATE INITIAL CERTIFICATE PRINCIPAL BALANCE	FEATURES (1)	MATURITY DATE	MOODY'S/ S&P/FITCH	MINIMUM DENOMINATIONS (2)
(S) Class A-1	(C) Adjustable	(C) \$103,066,220.00	Senior/Floater/Adjustable Rate	(C) December, 2035	Aaa/AAA/AAA	(C) \$100,000.00

Class A-2	Rate Adjustable	\$17,924,560.00	Senior/Inverse Floater/Adjustable Rate	December, 2035	Aaa/AAA/AAA	\$100,000.00
Class A-3	5.75%	\$49,879,000.00	Super Senior/ Fixed Rate	December, 2035	Aaa/AAA	\$100,000.00
Class A-4	5.75%	\$1,871,320.00	Senior Support/ Fixed Rate	December, 2035	Aa1/AAA/AAA	\$100,000.00
Class A-5	5.75%	\$81,289,900.00	Senior/Fixed Rate	December, 2035	Aaa/AAA/AAA	\$100,000.00
Class A-6	5.75%	\$32,000,000.00	Super Senior/Lockout/Fixed Rate	December, 2035	Aaa/AAA	\$100,000.00
Class A-7	5.75%	\$5,716,000.00	Senior Support/Lockout/Fixed Rate	December, 2035	Aa1/AAA/AAA	\$100,000.00
Class A-8	5.50%	\$15,986,000.00	Super Senior/Accretion Directed/Fixed Rate	December, 2035	Aaa/AAA/AAA	\$100,000.00
Class A-9	5.50%	\$21,160,000.00	Super Senior/Accrual/Fixed Rate	December, 2035	Aaa/AAA/AAA	\$100,000.00
Class A-10	6.25%	\$15,000,000.00	Senior/Fixed Rate	December, 2035	Aaa/AAA/AAA	\$100,000.00
Class A-11	6.25%	\$4,200,000.00	Senior/Retail/Fixed Rate	December, 2035	Aaa/AAA/AAA	\$1,000.00
Class A-12	5.50%	\$1,254,000.00	Senior Support/Accretion Directed Fixed Rate	December, 2035	Aa1/AAA/AAA	\$100,000.00
Class A-P	0.00%	\$3,504,096.32	Senior/Principal Only	December, 2035	Aaa/AAA/AAA	\$100,000.00
Class A-V	Variable Rate(3) Rate	Notional	Senior/Interest Only/Variable	December, 2035	Aaa/AAA/AAA	\$2,000,000.00
Class R-I	5.75%	\$100.00	Senior/Residual/Fixed Rate	December, 2035	Aaa/AAA/AAA	(4)
Class R-II	5.75%	\$100.00	Senior/Residual/Fixed Rate	December, 2035	Aaa/AAA/AAA	(4)
Class M-1	5.75%	\$7,515,400.00	Mezzanine/Fixed Rate	December, 2035	NA/NA/AA	\$100,000.00
Class M-2	5.75%	\$2,382,900.00	Mezzanine/Fixed Rate	December, 2035	NA/NA/A	\$250,000.00
Class M-3	5.75%	\$1,466,400.00	Mezzanine/Fixed Rate	December, 2035	NA/NA/BBB	\$250,000.00
Class B-1	5.75%	\$916,500.00	Subordinate/Fixed Rate	December, 2035	NA/NA/BB	\$250,000.00
Class B-2	5.75%	\$549,900.00	Subordinate/Fixed Rate	December, 2035	NA/NA/B	\$250,000.00
Class B-3	5.75%	\$916,565.37	Subordinate/Fixed Rate	December, 2035	NA/NA/NA	\$250,000.00

(/TABLE)

- (1) The Certificates, other than the Class B and Class R Certificates shall be Book-Entry Certificates. The Class B Certificates and the Class R Certificates shall be delivered to the holders thereof in physical form.
- (2) The Certificates, other than the Class R Certificates, shall be issuable in minimum dollar denominations as indicated above (by Certificate Principal Balance or Notional Amount, as applicable) and integral multiples of \$1 (or \$1,000 in the case of the Class B-1, Class B-2 and Class B-3 Certificates) in excess thereof, except that one Certificate of any of the Class B-1, Class B-2 and Class B-3 Certificates that contain an uneven multiple of \$1,000 shall be issued in a denomination equal to the sum of the related minimum denomination set forth above and such uneven multiple for such Class or the sum of such denomination and an integral multiple of \$1,000.
- (3) The initial Pass-Through Rate on the Class A-V Certificates is 0.1674%.
- (4) The Class R Certificates shall be issuable in minimum denominations of not less than a 20% Percentage Interest; provided, however, that one Class R Certificate will be issuable to Residential Funding as "tax matters person" pursuant to Section 10.01(c) and (e) in a minimum denomination representing a Percentage Interest of not less than 0.01%.

(PAGE)

The Mortgage Loans have an aggregate principal balance as of the Cut-off Date of \$366,598,962.

In consideration of the mutual agreements herein contained, the Company, the Master Servicer and the Trustee agree as follows:

(PAGE)

ARTICLE I

DEFINITIONS

Section 1.01...Definitions.

Whenever used in this Agreement, the following words and phrases, unless the context otherwise requires, shall have the meanings specified in this Article.

Accretion Termination Date: The earlier of (a) the Distribution Date on which the aggregate Certificate Principal Balance of the Class A-8 Certificates and Class A-12 Certificates is reduced to zero and (b) the Credit Support Depletion Date.

Accrual Certificates: The Class A-9 Certificates.

Accrual Distribution Amount: With respect to each Distribution Date preceding the Accretion Termination Date, an amount equal to the amount of Accrued Certificate Interest on the Class A-9 Certificates that is added to the Certificate Principal Balance of the Class A-9 Certificates, on such Distribution Date pursuant to Section 4.02(h).

Adjustable Rate Certificates: Any one of the Class A-1 Certificates and Class A-2 Certificates.

Bankruptcy Amount: As of any date of determination prior to the first anniversary of the Cut-off Date, an amount equal to the excess, if any, of (A)

\$100,000 over (B) the aggregate amount of Bankruptcy Losses allocated solely to one or more specific Classes of Certificates in accordance with Section 4.05 of this Series Supplement. As of any date of determination on or after the first anniversary of the Cut-off Date, an amount equal to the excess, if any, of

(1) the lesser of (a) the Bankruptcy Amount calculated as of the close of business on the Business Day immediately preceding the most recent anniversary of the Cut-off Date coinciding with or preceding such date of determination (or, if such date of determination is an anniversary of the Cut-off Date, the Business Day immediately preceding such date of determination) (for purposes of this definition, the "Relevant Anniversary") and (b) the greater of

(A) the greater of (i) 0.0006 times the aggregate principal balance of all the Mortgage Loans in the Mortgage Pool as of the Relevant Anniversary (other than Additional Collateral Loans, if any) having a Loan-to-Value Ratio at origination which exceeds 75% and (ii) \$100,000; and

(B) the greater of (i) the product of (x) an amount equal to the largest difference in the related Monthly Payment for any Non-Primary Residence Loan remaining in the Mortgage Pool (other than Additional Collateral Loans, if any) which had an original Loan-to-Value Ratio of 80% or greater that would result if the Net Mortgage Rate thereof was equal to the weighted average (based on the principal balance of the Mortgage Loans as of the Relevant Anniversary) of the Net Mortgage Rates of all Mortgage Loans as of the Relevant Anniversary less 1.25% per annum, (y) a number equal to the weighted average remaining term to maturity, in months, of all Non-Primary Residence Loans remaining in the Mortgage Pool as of the Relevant Anniversary, and (z) one plus the quotient of the number of all Non-Primary Residence Loans remaining in the Mortgage Pool divided by the total number of Outstanding Mortgage Loans in the Mortgage Pool as of the Relevant Anniversary, and (ii) \$100,000,

over

(2) the aggregate amount of Bankruptcy Losses allocated solely to one or more specific Classes of Certificates in accordance with Section 4.05 since the Relevant Anniversary.

The Bankruptcy Amount may be further reduced by the Master Servicer (including accelerating the manner in which such coverage is reduced) provided that prior to any such reduction, the Master Servicer shall (i) obtain written confirmation from each Rating Agency that such reduction shall not reduce the rating assigned to any Class of Certificates by such Rating Agency below the lower of the then-current rating or the rating assigned to such Certificates as of the Closing Date by such Rating Agency and (ii) provide a copy of such written confirmation to the Trustee.

Business Day: Any day other than (i) a Saturday or a Sunday or (ii) a day on which banking institutions in the State of New York, the State of Michigan, the State of California, the State of Illinois or the City of St. Paul, Minnesota (and such other state or states in which the Custodial Account or the Certificate Account are at the time located) are required or authorized by law or executive order to be closed.

Certificate: Any Class A, Class M, Class B or Class R Certificate.

Certificate Account: The separate account or accounts created and maintained pursuant to Section 4.01 of the Standard Terms, which shall be entitled "U.S. Bank National Association, as trustee, in trust for the registered holders of Residential Funding Mortgage Securities I, Inc., Mortgage Pass-Through Certificates, Series 2005-S9" and which must be an Eligible Account.

Class A Certificate: Any one of the Class A-1, Class A-2, Class A-3, Class A-4, Class A-5, Class A-6, Class A-7, Class A-8, Class A-9, Class A-10, Class A-11, Class A-12, Class A-P or Class A-V Certificates, executed by the Trustee and authenticated by the Certificate Registrar substantially in the form annexed to the Standard Terms as Exhibit A.

Class A-3 Optimal Percentage: As to any Distribution Date on or after the Credit Support Depletion Date, a fraction expressed as a percentage, the numerator of which is the Certificate Principal Balance of the Class A-3 Certificates immediately prior to that Distribution Date and the denominator of which is the aggregate Certificate Principal Balance of the Senior Certificates (other than the Class A-P Certificates) immediately prior to that Distribution Date.

Class A-3 Optimal Principal Distribution Amount: As to any Distribution Date on or after the Credit Support Depletion Date, an amount equal to the product of (a) the then applicable Class A-3 Optimal Percentage and (b) the amounts described in clause (b) of the definition of Senior Principal Distribution Amount.

Class A-6/A-9 Optimal Percentage: As to any Distribution Date on or after the Credit Support Depletion Date, a fraction expressed as a percentage, the numerator of which is the sum of the Certificate Principal Balances of the Class A-6 and Class A-9 Certificates immediately prior to that Distribution Date and the denominator of which is the aggregate Certificate Principal Balance of the Senior Certificates (other than the Class A-P Certificates) immediately prior to that distribution date.

Class A-6/A-9 Optimal Principal Distribution Amount: As to any Distribution Date on or after the Credit Support Depletion Date, an amount equal to the product of (a) the then applicable Class A-6/A-9 Optimal Percentage and (b) the amounts described in clause (b) of the definition of Senior Principal Distribution Amount.

Class A-8 Optimal Percentage: As to any Distribution Date on or after the Credit Support Depletion Date, a fraction expressed as a percentage, the numerator of which is the Certificate Principal Balance of the Class A-8 Certificates immediately prior to that Distribution Date and the denominator of which is the aggregate Certificate Principal Balance of the Senior Certificates (other than the Class A-P Certificates) immediately prior to that Distribution Date.

Class A-8 Optimal Principal Distribution Amount: As to any Distribution Date on or after the Credit Support Depletion Date, an amount equal to the product of (a) the then applicable Class A-8 Optimal Percentage and (b) the amounts described in clause (b) of the definition of Senior Principal Distribution Amount.

Class A-8/A-9/A-12 Percentage: With respect to any Distribution Date, a fraction expressed as a percentage, the numerator of which is an amount equal to the aggregate Certificate Principal Balance of the Class A-8, Class A-9, and Class A-12 Certificates immediately prior to that Distribution Date, and the denominator of which is an amount equal to the aggregate Certificate Principal Balance of the Class A-8, Class A-9, Class A-10, Class A-11 and Class A-12 Certificates immediately prior to that Distribution Date.

Class A-10/A-11 Percentage: With respect to any Distribution Date, a percentage equal to 100% minus the Class A-8/A-9/A-12 Percentage as of that Distribution Date.

Class R Certificate: Any one of the Class R-I or Class R-II Certificates executed by the Trustee and authenticated by the Certificate Registrar substantially in the form annexed to the Standard Terms as Exhibit D and evidencing an interest designated as a "residual interest" in the related REMIC for purposes of the REMIC Provisions.

Closing Date: December 29, 2005.

Corporate Trust Office: The principal office of the Trustee at which at any particular time its corporate trust business with respect to this Agreement shall be administered, which office at the date of the execution of this Agreement is located at U.S. Bank National Association, U.S. Bank Corporate Trust Services, EP-MN-W33D, 60 Livingston Avenue, St. Paul, Minnesota 55107, Attention: RFMSI 2005-S9.

Cut-off Date: December 1, 2005.

Determination Date: With respect to any Distribution Date, the second Business Day prior to such Distribution Date.

Discount Net Mortgage Rate: 5.75% per annum.

Due Period: With respect to each Distribution Date and any Mortgage Loan, the calendar month of such Distribution Date.

Eligible Account: An account that is any of the following: (i) maintained with a depository institution the debt obligations of which have been rated by each Rating Agency in its highest rating available, or (ii) an account or accounts in a depository institution in which such accounts are fully insured to the limits established by the FDIC, provided that any deposits not so insured shall, to the extent acceptable to each Rating Agency, as evidenced in writing, be maintained such that (as evidenced by an Opinion of Counsel delivered to the Trustee and each Rating Agency) the registered Holders of Certificates have a claim with respect to the funds in such account or a perfected first security interest against any collateral (which shall be limited to Permitted Investments) securing such funds that is superior to claims of any other depositors or creditors of the depository institution with which such account is maintained, or (iii) in the case of the Custodial Account, a trust account or accounts maintained in the corporate trust department of U.S. Bank National Association, or (iv) in the case of the Certificate Account, a trust account or accounts maintained in the corporate trust division of the Trustee, or (v) an account or accounts of a depository institution acceptable to each Rating Agency (as evidenced in writing by each Rating Agency that use of any such account as the Custodial Account or the Certificate Account will not reduce the rating assigned to any Class of Certificates by such Rating Agency below the lower of the then current rating or the rating assigned to such Certificates as of the Closing Date by such Rating Agency).

Eligible Funds: On any Distribution Date, the portion, if any, of the Available Distribution Amount remaining after reduction by the sum of (i) the aggregate amount of Accrued Certificate Interest on the Senior Certificates, (ii) the Senior Principal Distribution Amount (determined without regard to Section 4.02(a)(i)(Y)(D) of this Series Supplement), (iii) the Class A-P Principal Distribution Amount (determined without regard to Section 4.02(b)(i)(E) of this Series Supplement) and (iv) the aggregate amount of Accrued Certificate Interest on the Class M, Class B-1 and Class B-2 Certificates.

Floater Certificates: The Class A-1 Certificates.

Fraud Loss Amount: As of any date of determination after the Cut-off